



Legal Capacity

Maine Rules of Professional Conduct

Rule 1.14 Client with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.



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(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.



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(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6 [regarding confidentiality of information]. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.



Capacity is Not a Constant

“Capacity is like a lava lamp;
it can ebb and flow
so you have to go with the flow.”

Roberta K. Flowers

Professor of Law

Stetson University College of Law



Assessing Capacity

ABA Commn. on L. & Aging & Am. Psychological Assn.,
*Assessment of Older Adults with Diminished Capacity: A
Handbook for Lawyers* (2005)

Different Standards of Capacity for Specific Legal Transactions

- Testamentary Capacity
- Donative Capacity
- Contractual Capacity
- Capacity to Execute a Financial Power of Attorney
- Decisional Capacity in Health Care

Note: Uniform Health Care Decisions Act defines “capacity” as an individual’s ability to understand the significant benefits, risks, and alternatives to proposed health care and to make and communicate a health-care decision.

Level of Risk and Level of Capacity

Does the level of potential risk to the decision maker help define the level of capacity necessary to make a decision? Does the threshold level of capacity vary with the degree of risk? The higher the risk of abuse and the greater the likelihood of adverse consequences to the individual, the more capacity must be shown?

Excerpt from Probate Court Form PP-505: Physician's/Psychologist's Guardian/Conservator Proceeding

4. If the appointment of a guardian is sought (answer either A **OR** B):

___ A. It is my opinion that the mental and functional condition of the above-named person to care for himself/herself and/or to make, communicate or implement decisions about her/his well-being is limited., and s/he is incapable of performing ANY of the tasks listed in 4(B).

OR

___ B. I have checked below all things I believe the patient does possess sufficient mental and physical capacity to perform, and I have indicated when appropriate, whether such functions can be performed only with assistance:

- ___ (1) Establish his/her place of abode.
- ___ (2) Place himself/herself in any hospital or any other institution
- ___ (3) Make provisions for his /her care, comfort and maintenance.
- ___ (4) Give or withhold consents or approvals related to medical or other professional care, counsel, treatment or service.
- ___ (5) To manage, protect, and expend assets and income

Excerpt from Probate Court Form PP-505: Physician's/Psychologist's
Guardian/Conservator Proceeding

5. If the appointment of a conservator is sought (answer either A **OR** B):

____ A. It is my opinion that the mental and functional condition of the above-named person to manage his/her property and financial affairs is limited and that s/he is incapable of performing any of the tasks listed in 5(B). **OR**

____ B. I have checked below all things I believe the patient does possess sufficient mental and physical capacity to perform, and I have indicated when appropriate, whether such functions can be performed only with assistance.

Continued on next slide.

Excerpt from Probate Court Form PP-505: Physician's/Psychologist's Guardian/Conservator Proceeding

___ (1) Receive money and tangible property and apply the money and property for his/her support, care and education.

___ (2) Collect, hold and retain assets (including real estate).

___ (3) Deposit and withdraw funds.

___ (4) Invest and reinvest his/her assets.

___ (5) Dispose of assets.

___ (6) Pay bills.

___ (7) Establish and use credit and borrow money.

Continued on next slide.

Excerpt from Probate Court Form PP-505: Physician's/Psychologist's
Guardian/Conservator Proceeding

- ___ (8) Pay, settle, prosecute or contest any claim.
- ___ (9) Sell or exercise stock subscription or conversion rights.
- ___ (10) Enter into any contract, financial commitment or lease.
- ___ (11) participate in the operation of any business enterprise.
- ___ (12) Vote a security, in person or by general or limited proxy.
- ___ (13) Make ordinary or extraordinary repairs or alterations to or in buildings or other structures belonging to him/her.
- ___ (14) Employ persons, including attorneys, auditors, investment advisors or agents, to advise or assist her/him.

Dr. Fingerman

Capacity vs. Competency

Capacity vs Competency

- Capacity is a medical determination
- Competence is a judicial determination

Determining Capacity

- Maine State Law (18§5-101)

"Incapacitated person" means any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause except minority to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person.

Healthy Elderly Controls – 2.8%
Mild Cognitive Impairment – 20%
Medical Inpatients – 26%
Nursing Home Residents – 44%
Alzheimer's Disease – 54%

Ten Myths About Capacity

1. Decision-making capacity = competency.
2. Against medical advice = lack of decision-making capacity.
3. There's no need to assess decision-making capacity unless a patient goes against medical advice.
4. Decision-making capacity is all or nothing.
5. Cognitive impairment = no decision- making capacity.
6. Lack of decision-making capacity is permanent.
7. Patients who have not been given relevant information about their condition can lack decision-making capacity.
8. All patients with certain psychiatric disorders lack decision-making capacity.
9. All institutionalized patients lack decision-making capacity.
10. Only psychiatrists and psychologists can assess decision-making capacity.

Source: Ganzini L, Volicer L, Nelson WA, Fox E, Derse AR. Ten myths about decisionmaking capacity. J Am Med Dir Assoc. 2004;5(4):263-267.

Determining Capacity

- Appelbaum and Grisso (*NEJM*, 1988) necessary and jointly sufficient conditions for decisional capacity:
 - the ability to communicate choices;
 - the ability to understand relevant information;
 - the ability to rationally manipulate information; and
 - the ability to appreciate the situation and its consequences.
- Capacity determinations are made for a particular time and indexed to a particular question.
 - A patient can lack capacity today and have it tomorrow.
 - A patient can have capacity to appoint a POA, but lack capacity to consent to cardiac surgery.

Communicate a Choice

- Patient's role
 - Clearly indicates preferred tx option
 - Settings of altered communication (Aphasia, Intubated)
- Questions for Assessment
 - Have you decided?
 - What is making it hard for you to decide?
- Frequent reversals or ambivalence may indicate lack of capacity

Understanding

- Grasps the fundamental meaning of information provided
- Patient is encouraged to paraphrase the information (their own words)
 - This shows the patient is not just reciting information
 - “Please tell me in your own words what your doctor told you”
- Understands nature of condition, nature and purpose of treatment, benefits/risks of tx/no tx

Appreciation of the Situation

- Acknowledgement of the condition as it pertains to them (the patient)
- Patient's views of conditions
- “What do you **believe** is wrong with your health?”
- “Do you **believe** you need treatment”
- “What do you **believe** will happen if you are/are not treated”
- Lack of acknowledgement/insight, delusions, pathologic levels of distortion

Rational Manipulation of Information

- Patient is asked to compare treatment options and offer reasons for choice (s)
- Chain of Reasoning
- “How did you decide to accept/reject the treatment?”
- How treatments correspond to their Values
- Focus is on the process by which decision is made, not the outcome
- Patient’s have right to make “unreasonable choices”

Decisions consistent with values

- What does the patient value?
 - Quality of life, Quantity of life
- Do we have outside surrogates who can speak to the patient's values if the patient cannot
 - Would the patient want treatment?
- Attempts to preserve Autonomy whenever possible

Pseudo-Incapacity

- Patient appears to lack capacity, but only b/c the situation has not been explained in a manner they can understand
 - Avoid medical jargon
 - Ask about baseline education, reading/writing difficulties, illiteracy
- Capacity exists as a continuum, and can be optimized

Criterion	Patient's Task	Physician's Assessment	Questions	Comments
Communicate a choice	Clearly indicates preference	Ask pt to indicate a tx choice	Can you tell me what your decision is? What is making it hard to decide	Frequent reversals of choice may indicate lack of capacity
Understand relevant information	Grasp meaning of information	Encourage pt to paraphrase information	Please tell me in your own words about: Condition, Tx options, benefits/risks	Demonstrate understanding of condition, tx, risks/benefits
Appreciate situation	Acknowledge condition, tx options as it pertains to them	Ask pt to describe their views, beliefs about tx	What do you believe is the problem? What is tx likely to do for you	Lack of insight can indicate lack of capacity
Reasoning	Rational process of information	Compare tx options, offer reasons for decisions	How did you decide? What makes this choice better?	Focus on the process by which a decision is reached, not the outcome... flawed logic?

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Aid to capacity evaluation

Name of patient: _____

Record observations that support your score in each domain, including exact responses of the patient. Indicate your score for each domain with a check mark.

- 1. Able to understand medical problem**
(Sample questions: What problem are you having right now? What problem is bothering you most? Why are you in the hospital? Do you have [name problem here]?)
Observations: _____
☐ Yes
☐ Unsure
☐ No
- 2. Able to understand proposed treatment**
(Sample questions: What is the treatment for [your problem]? What else can we do to help you? Can you have [proposed treatment]?)
Observations: _____
☐ Yes
☐ Unsure
☐ No
- 3. Able to understand alternative to proposed treatment (if any)**
(Sample questions: Are there any other [treatments]? What other options do you have? Can you have [alternative treatment]?)
Observations: _____
☐ Yes
☐ Unsure
☐ No
☐ None disclosed
- 4. Able to understand option of refusing proposed treatment (including withholding or withdrawing proposed treatment)**
(Sample questions: Can you refuse [proposed treatment]? Can we stop [proposed treatment]?)
Observations: _____
☐ Yes
☐ Unsure
☐ No

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5. **Able to appreciate reasonably foreseeable consequences of accepting proposed treatment** ☐ Yes
(Sample questions: What could happen to you if you have [proposed treatment]? Can [proposed treatment] cause problems/side effects? Can [proposed treatment] help you live longer?) ☐ Unsure
☐ No
Observations: _____

6. **Able to appreciate reasonable foreseeable consequences of refusing proposed treatment (including withholding or withdrawing proposed treatment)** ☐ Yes
(Sample questions: What could happen if you don't have [proposed treatment]? Could you get sicker/die if you don't have [proposed treatment]? What could happen if you have [alternative treatment]? [If alternatives are available]) ☐ Unsure
☐ No
Observations: _____

NOTE: for questions 7a and 7b, a "yes" answer means the person's decision is affected by depression or psychosis.

7a. **The person's decision is affected by depression.** ☐ Yes
(Sample questions: Can you help me understand why you've decided to accept/refuse treatment? Do you feel that you're being punished? Do you think you're a bad person? Do you have any hope for the future? Do you deserve to be treated?) ☐ Unsure
☐ No
Observations: _____

7b. **The person's decision is affected by delusion/psychosis.** ☐ Yes
(Sample questions: Can you help me understand why you've decided to accept/refuse treatment? Do you think anyone is trying to hurt/harm you? Do you trust your doctor/nurse?) ☐ Unsure
☐ No
Observations: _____

FIGURE 2. Aid to capacity evaluation. (continued)

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